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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

FRAN WEISS, ARTHUR WEISS,
and MELISSA WILLIAMS HOLZER,

*Petitioners,*

*v.*

TERRY WILLIAMS,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE**

## PETITION FOR A WRIT OF CERTIORARI

RICHARD MARCUS
4221 Wilshire Boulevard
Suite 397
Los Angeles, CA 90010
(323) 954-8054

MICHAEL SPIEGEL
*Counsel of Record*
4221 Wilshire Boulevard
Suite 395
Los Angeles, CA 90010
(323) 964-9050

MELODYE S. HANNES
4419 Coldwater Canyon Avenue
Suite I
Studio City, CA 91601
(818) 781-0166

*Attorneys for Petitioners*

175765

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## QUESTIONS PRESENTED

1. Does an Appellate Court infringe upon a minor's substantive and procedural due process rights under the United States Constitution where said Court dismisses an appeal as of right of an order in guardianship proceedings involving grandparents and father determining it is in the minor's best interests to live with her father and that she will not suffer any detriment if forced to do so based upon the alleged conduct of the minor's grandparents and counsel where the order was not the product of a fair trial as a matter of law?

2. Does the Due Process Clause of the United States Constitution permit an Appellate Court to dismiss an appeal as of right where the dismissal will cause the findings of fact and conclusions of law which were not the product of a fair trial to have a res judicata and collateral estoppel effect in other similarly related proceedings involving the same parties?

3. Does the Due Process Clause of the United States Constitution permit an Appellate Court to sanction counsel for $13,004.00 and refuse to consider and permit counsel to provide their defense to charges of wrongdoing leveled against them by the Appellate Court for the first time in the Court's opinion?

## PARTIES TO THE PROCEEDING

The Petitioners Fran and Arthur Weiss were the Appellants in the original proceedings and the Petitioners in the guardianship proceedings. The Petitioner Melissa Williams Holzer, an emancipated minor pending annulment proceedings commenced by her father, Terry Williams, was the subject of the guardianship proceedings. Melodye S. Hannes and Richard A. Marcus were the attorneys of record for the Petitioners Fran and Arthur Weiss in the proceedings below and are being served as Respondents.

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## OPINIONS BELOW

The initial opinion of the Court of Appeal before a Petition for Rehearing was granted is reported at 95 Cal. App. 4th 1433, 116 Cal. Rptr. 2d 577. (App. C). The opinion of the Court of Appeal after rehearing (App. A) is reported at 96 Cal. App 4th 1293, 118 Cal. Rptr. 2d 42. The opinion was modified without any change in the Judgment on April 11, 2002 in an unreported decision. (App. B).

## STATEMENT OF JURISDICTION

The decision of the Court of Appeal after rehearing was entered on March 19, 2002 and a timely Petition for Review was denied by the Supreme Court of California on May 22, 2002. (App. E). The federal questions were raised as indicated at pp. 13-14, *infra*. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1 provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE

This case involves the deprivation of the procedural and substantive due process rights of the Petitioners under the Fourteenth Amendment to the United States Constitution by the California Court of Appeal. This deprivation took place through the court's dismissal of the appeal of the Petitioners Fran and Arthur Weiss and the sanctioning of their attorneys, Melodye S. Hannes and Richard A. Marcus, in the sum of $13,004.00.

The underlying proceedings were proceedings commenced by the Petitioners Fran and Arthur Weiss for guardianship of their granddaughter, Melissa Williams Holzer. Respondent Terry Williams is Melissa's father.

The Court of Appeal dismissed the appeal of the Petitioners Fran and Arthur Weiss because of its belief that the Petitioners had sought to frustrate the order of the trial court by signing consent forms which permitted the minor to marry and thus become emancipated so that she did not have to return to her father. The Court also stated that the marriage had mooted the issues of the appeal although the court acknowledged that Respondent was pursuing annulment proceedings and specifically found that Petitioners could not have consented to the marriage as the minor's guardians. As punishment for their conduct, the penultimate sanction of dismissal of the appeal was levied upon them. As will be explained herein, Petitioners did not seek to frustrate, nor were they in contempt of any order of the trial court.

Most importantly, irrespective of the conduct of the Weisses and their counsel, the dismissal of the appeal

deprived the Petitioner/minor Melissa Williams of her substantive and procedural due process rights under the Fourteenth Amendment. The trial court's decision was not the product of a fair trial and mandated reversal under California law. That decision determined among other things, Melissa would not suffer any detriment if forced to live with her father and that it was in her best interests to do so.

The court's decision has deprived Melissa of her liberty interest by taking away the right to appeal and finalizing this erroneous decision which will serve as the basis to compel her to live with her father against her will even though she never received a fair trial as a matter of law.[1] Moreover, Melissa has a fundamental right and the State has a duty and obligation to protect the health, safety and welfare of the minor. Even though the Appellate Court knew that the trial was unfair under California law, and it indicated in its opinion very strongly that there was no basis for the marriage under California law, it nevertheless dismissed the appeal with full knowledge that Melissa had not received a fair trial in derogation of its obligation to safeguard the minor. Curiously, it appears to have done everything it could to set the marriage up for invalidation while at the same time finding the issues to be moot.

The Court of Appeal also violated Fran and Arthur Weiss's Fourteenth Amendment due process rights when it dismissed the appeal because the erroneous findings of fact and conclusions of law which were not the product of a fair trial have become res judicata as to them, and they are

1. Respondent has just filed a motion for summary judgment in the annulment action and it is Petitioners' understanding that Melissa's husband will be consenting to the annulment of the marriage shortly. On or about August 14, 2002 the court clerk entered the default of Petitioner Melissa Williams Holzer in the annulment action.

collaterally estopped from challenging these findings and conclusions in related proceedings involving the same parties.

Lastly, the Court of Appeal has violated the due process rights of Melodye S. Hannes and Richard A. Marcus because it deprived them of property by sanctioning them for $13,004.00 without giving them a fair hearing and opportunity to be heard before assessing the sanctions. The court reached the determination that counsel had acted improperly without providing counsel with notice and an opportunity to be heard before pronouncing sentence. Despite the Court's opinion, it is undisputed that the court inquired only of Fran and Arthur's conduct in its order to show cause but nevertheless determined in the OSC that counsel's conduct was wrongful. Then the Court refused to give counsel the opportunity to present their version of the facts when it granted the petition for rehearing solely for the purposes of determining the amount for which counsel should be sanctioned.

## 1. TRIAL COURT PROCEEDINGS.

Pursuant to Letters of Temporary Guardianship granted by the Honorable H. Ronald Hauptman on August 25, 1999 (Clerk's Transcript (hereinafter "CT") 49), Petitioners Fran and Arthur Weiss became the temporary guardians of Melissa. Despite Respondent's two attempts to terminate the temporary letters (CT 88 & 98), they remained in effect from August of 1999 through trial in June of 2001. *See* Exhibits D, E, F, G, & H of Petitioners' Verified Petition for Rehearing re: Dismissal of Appeal & Sanctions (hereinafter "Petition for Rehearing").

Both the court appointed psychiatrist and the probate investigator opined that Melissa should continue to live with her grandparents. After the court indicated to counsel in an in-chambers conference its intent to follow the recommendation of the psychiatrist and probate investigator, Respondent then sought writ review with the California Court of Appeal. By Order to Show Cause dated April 13, 2001, the Appellate Court asked Petitioners to demonstrate why the matter was not controlled by this Court's determination in *Troxel v. Granville*, 530 U.S. 57 (2000), why the proceedings were not an unconstitutional infringement of a parent's fundamental right to rear his children, and the basis for an outsider to the parent-child relationship to interfere with the relationship.

The Appellate Court ordered the trial court to conduct an evidentiary hearing and prepare its findings of fact and conclusions of law for immediate transmission to the Court of Appeal. The court then stayed all other proceedings in the trial court.

Despite the fact that the Commissioner Hauptman had been assigned for all purposes, Respondent objected to his presiding over the trial. The Honorable Victor E. Chavez was then assigned to preside over the proceedings. A four day trial ensued. At the conclusion, the trial court found that Petitioners had not met their burden of proof. The court orally stayed the proceedings for thirty days but found that it was in Melissa's best interests to live with her father and that she would not suffer any detriment if forced to live with him. *See* RT @ 958-959. The court then issued its written judgment after court trial on or about June 12, 2001.

## A. THE BAHAMAS MARRIAGE

There is a great deal of contention between the Petitioners and the Court of Appeal surrounding the issue of Petitioners and counsel's role in "procuring" the marriage of the minor which emancipated her. For purposes of determining whether Melissa's constitutional rights have been violated, the events surrounding the marriage are far less important due to the substantive Due Process obligation of the State to protect her and her procedural due process rights to a fair trial on the issue of detriment before she can be compelled to live with her abusive father.

What is undisputed for purposes of these proceedings is that after the judgment had been rendered, the Petitioners Fran and Arthur Weiss did execute consent forms which gave Melissa their permission to consent to the marriage between her and her boyfriend Austin Holzer. Melissa went to the Bahamas to marry her boyfriend and Melodye S. Hannes accompanied her there.

## B. DENIAL OF A FAIR TRIAL ON MERITS

Petitioners, as a matter of law, were denied a fair trial on the merits when Judge Chavez precluded their expert witness from testifying because counsel for Petitioners did not disclose his identity in advance of trial in alleged violation of a local court rule. *See* Reporter's transcript hereinafter ("RT") @ 334-336, 399-402. An offer of proof was made that the Doctor had examined Melissa and Appellants and that the Doctor would testify as to the detriment that Melissa would suffer if forced to live with her father. There was no showing or inquiry by the Court to determine whether the Petitioners themselves were somehow responsible for the alleged failure to disclose the expert's identity.

The Court's action deprived Petitioners of a fair trial because under Cal. Code of Civ. Proc. § 575.(2)(b), the Court may not punish a party for its counsel's violation of a local rule if the party was not at fault.

In *State of Cal. ex rel. Public Works Board v. Bragg*, 183 Cal. App. 3d 1018, 228 Cal. Rptr. 576 (1986), the court held that, in accordance with Section 575.(2)(b), the trial court should not have sanctioned the Appellant in granting the Respondent's motion to exclude an expert's appraisal report and testimony because the Appellant did not comply with a Los Angeles County Local Rule.

Since the appellant in *Bragg* bore no responsibility for counsel's failure to comply with the local rule, the trial court should not have sanctioned Appellant in precluding the introduction of the appraisal and the expert's testimony. The facts in *Bragg* were almost identical to the facts in the instant matter because in this matter, the court precluded the testimony due to a failure to disclose the existence of Petitioners' expert witness.

As the California Supreme Court noted in *Garcia v. Mccutchen*, 16 Cal. 4th 469, 66 Cal. Rptr. 2d 319 (1997), because Section 575.(2)(b) directs that any penalty must be imposed on counsel when non-compliance is the responsibility of counsel and not of the party, dismissal without consideration of whether counsel or the client is at fault is not a sanction authorized by law.

In *Moyal v. Lanphear*, 208 Cal. App. 3d 491, 502, 256 Cal. Rptr. 296 (1989), the court explained that, in section 575.(2)(b), "[t]he Legislature has made clear its intent a party's cause of action should not be impaired or destroyed by his or her attorney's procedural mistakes."

In *Cooks v. Superior Court*, 224 Cal. App. 3d 723, 727, 274 Cal. Rptr. 113 (1990), the court construed section 575.(2)(b) "to proscribe any sanction against an innocent party for local rule violations of counsel and to proscribe sanctions against counsel that adversely affect the party's cause of action or defense thereto." These decisions also hold that a court must invoke section 575.(2)(b) on its own motion when necessary to protect an innocent party. *Cooks*, 224 Cal. App. 3d at 727; *Moyal*, 208 Cal. App. 3d at 502.

In *Marriage of Columbo*, 197 Cal. App. 3d 572, 242 Cal. Rptr. 100 (1987), the Court, in following *Bragg*, found that by not inquiring into the question of responsibility for the failure to comply with local rules, and by imposing the harsh penalty which it did, the trial court effectively denied the party a trial on the merits.

**2. APPELLATE COURT PROCEEDINGS.**

On or about July 11, 2001, Petitioners filed their notice of appeal. On or about September 25, 2001, the Respondent filed a motion seeking to dismiss the appeal upon grounds of mootness as a result of the marriage and upon the grounds that Petitioners were in contempt of the orders of the trial court.

No word came from the Court of Appeal. Petitioners timely filed their opening brief on or about December 28, 2001. Thereafter, on or about January 9, 2002, the Court of Appeal issued an order to show cause which asked counsel for Petitioners to brief three issues. The first was whether the appeal had been rendered moot by Melissa's emancipation. The second was whether Petitioners should be estopped to deny the validity of the marriage. The third

issue was whether Petitioners should be sanctioned for filing a frivolous appeal. As this Court can see from a review of the Order to Show Cause, the Appellate Court did not ask counsel to address their role in allegedly "procuring the marriage" or their alleged contempt of subversion of the trial court's order.

Petitioners addressed the three issues and by decision dated February 7, 2002, the court dismissed the appeal. In footnote 1, the court indicated that "The sole issue before us is whether the appeal is subject to dismissal due to the conduct of grandparents and their counsel." The appeal was dismissed based upon two grounds. First, the court found that the issues were rendered moot as a result of the marriage. Second, the court found that Petitioners had frustrated the very judgment of the trial court they were seeking to appeal thereby cutting off their right to maintain the appeal.

## A. MOOTNESS OF THE ISSUES BY THE MARRIAGE

The Court of Appeal glossed over the fact that Respondent had commenced an action to annul the marriage. Petitioners informed the court of this fact in its Reply on Order to Show Cause re: Dismissal of Appeal pp. 1-4 and Response to Motion to Dismiss Appeal pp. 1, 3 & 4.

The Court was even apprized of the fact that the Judge presiding over the annulment action (at the time the Appellate Court was considering the issue of mootness) had asked the parties to brief the issue as to why the Court should not order Melissa to live with her father pending trial. Petitioners explained to the Court of Appeal that Respondent had commenced three different proceedings and two ex parte

applications in an attempt to obtain a court order requiring Melissa's return. Thus the central issue of Melissa's detriment was still critical.

Had the appeal been withdrawn voluntarily with the annulment proceedings pending, counsel for petitioners would have committed clear malpractice.

Indeed, Respondent himself asserted at page five of his Response to Petitioners' Return to the Appellate Court's Order to show cause that "when the appeal is dismissed, and the custody order is confirmed, his daughter will come home, where she will remain, at least until she reaches the age of majority, and longer if she chooses." On the same page, Respondent asserts "The denial of the guardianship petition was a final determination of Respondent's entitlement to the custody of his daughter . . ." Thus, Respondent was quite clear in apprizing the Court that he intended to have the judgment at issue serve as the basis for compelling Melissa's return.

At the same time Respondent was contending the issues were rendered moot as a result of the marriage, he was seeking to annul the marriage in other proceedings. Moreover, the Court of Appeal indicated in its decision that grandparents lacked authority to consent to the marriage. *See* footnote 2 on page 4 of Decision of March 19, 2002.

Is the issue of the detriment Melissa will suffer if forced to live with her father truly moot when Respondent himself tells the Court of Appeal in his papers that he is "confident his daughter will soon be coming home?"

In addition, Petitioners contended that the other issues raised by the appeal such as the validity of the local probate

rules and the standard of proof which is in dispute between California Appellate Courts were not rendered moot as a result of the marriage. *See* pp. 17-18 of Petition for Rehearing.

## B. FRUSTRATING THE ORDERS OF THE TRIAL COURT

The Court of Appeal determined that Petitioners had acted to frustrate the order of the trial court. However, Petitioners were not in contempt of any order of Judge Chavez, as the Court had three independent opportunities to hold them in contempt. *See* pages 6-16 of the Petition for Rehearing. Despite the fact that no contempt charges had ever been brought and the trial court refused to acknowledge that Petitioners were in contempt of court, the Appellate Court, without giving Petitioners or their counsel notice and opportunity to be heard, determined that they had been in contempt of the trial court's orders and thus dismissed their appeal. If this Court reviews the Order to Show Cause it will see that none of the three things of concern to the Appellate Court was Petitioners alleged contempt and frustration of the trial court's order. A complete explanation of why the Petitioners were not in contempt of the trial court's order may be found in the Petition for Rehearing at pp. 6-16.

Most importantly, had the Petitioners actually been acting to frustrate the orders of the Court, that would still not serve as a valid justification for the Appellate Court to deprive Melissa of her constitutional rights and liberty by denying her an appeal to which she was entitled as a matter of right.

## C. NOT REVEALING THE EXISTENCE OF THE MARRIAGE

The Court also took issue with the fact that counsel had not disclosed the existence of the marriage to the court even though it was a public record. However, the fact of the marriage had not been disclosed to the court because: (1) there was a question as to the marriage's validity; (2) The Weisses and Melissa specifically instructed counsel to keep the fact of the marriage a secret and counsel believed they had an ethical obligation to maintain that confidence and secret even if it was a public record in accordance with *In the Matter of Johnson*, 4 Cal. State Bar Court Reporter 179 (Review Department 2000), State Bar of California's Standing Committee on Professional Responsibility and Conduct Op. 1996-146, & L.A. Cty. Bar Assn. Formal opns. 267, 305, 386, 417 & 436; (3) Melissa had intended not to rely upon the marriage when she tried to live with her father and in fact returned to him in accordance with the order; and (4) counsel believed in good faith that the issues raised by the appeal were not rendered moot as a result of the marriage inasmuch as Father was pursuing an annulment action and the questions of law presented by the appeal had not become moot. *See* Petition for Rehearing pp. 17-22.

## D. PETITION FOR REHEARING

Petitioners sought rehearing of the February 7, 2002 opinion because, among other things, the parties were not given the opportunity to brief the issues and present their side of the facts decided by the court pertaining to the alleged contempt and the court's factual findings regarding Petitioners' involvement in "procuring the marriage" and frustrating the judgment of the trial court. The Petition was granted but only for the sole purpose of determining how much in attorneys fees Petitioners should be sanctioned.

## E. DECISION AFTER REHEARING

After rehearing, the Court of Appeal refused to consider the factual issues raised by Petitioners and sanctioned Hannes and Marcus in the sum of $13,004.00.

## 3. SUPREME COURT OF CALIFORNIA REVIEW & RAISING OF FEDERAL QUESTIONS.

Petitioners then timely sought review from the Supreme Court of California, who denied the Petition without opinion or other explanation. In the Petition, Petitioners squarely raised the constitutional issues presented by this Petition. At page 1, the third question presented raises the issue of the infringement of Melissa's due process rights.

At page 12, Petitioners state:

> MELISSA HAS A DUE PROCESS RIGHT TO A FAIR TRIAL ON THE ISSUE OF THE DETRIMENT SHE WOULD SUFFER IF FORCED TO LIVE WITH HER FATHER AGAINST HER WILL.
>
> Under the United States and California Constitutions, Melissa is entitled to due process as a matter of law. The Court's decision to dismiss the appeal based upon counsel's and Petitioners' alleged actions to frustrate the judgment of the court violate *Melissa's* constitutional rights to have a court fairly determine whether she will suffer detriment if forced to live with her father against her will since she has been living with her grandparents since early 1997.

At page 12, the Petition also notes the State's obligation to protect Melissa and her fundamental right to be protected from neglect and have placement in a stable and permanent home in arguing that Melissa's constitutional rights must take precedence over father's when the two conflict. At page 13, Petitioners assert that by dismissing the appeal, the court deprived Melissa of her fundamental and constitutional rights because the legally erroneous judgment is being used as a basis to compel her return to her father.

Similarly, at page 13, Petitioners assert that the dismissal of the appeal violated Petitioners' constitutional rights by giving legally erroneous rulings a collateral estoppel effect in pending litigation between the parties. At page 14, Petitioners Fran and Arthur Weiss argue that the court's decision to dismiss the appeal is a deprivation of their due process rights.

From page 8 to page 10, Petitioners argue that the Court was required to grant the petition for rehearing and consider the facts presented rather than grant the petition solely for purposes of sanctioning counsel. Petitioners also argue that the court never asked and never gave the Petitioners the opportunity to address the very facts it relied upon in dismissing the appeal, the alleged subversion and contempt of the trial court's order.

Additionally, the federal questions were raised to the Court of Appeal as follows: Petition for Rehearing pp. 2, 4, 5, & 6; Memorandum of Points & Authorities in Response to Court's Order to Show Cause pp. 1-7; Response to Motion to Dismiss Appeal pp. 1, 3 & 7; Reply on Order to Show Cause pp. 4 & 9.

## REASONS FOR GRANTING THE WRIT

### 1. REFUSING TO GRANT REVIEW WILL CONDONE THE APPELLATE COURT'S ACTIONS OF DELIBERATELY DEPRIVING MELISSA OF HER SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS

One need not read very deeply between the lines to see what the Court of Appeal has *deliberately* done by virtue of its decision. First, it indicated that grandparents could not validly consent to the marriage even though that issue was not before the Court.

After being presented with evidence that the Judge presiding over the annulment proceeding was inclined to invalidate the marriage and wanted the parties to brief the issue as to why the Court should not order Melissa to live with her father pending trial, the Court of Appeal then determined that the issue of the minor's detriment is rendered moot by the marriage.

The Court of Appeal was presented with ample case law demonstrating that Melissa did not receive a fair trial as a matter of law. Indeed, one case cited with almost the identical facts as this case clearly showed that the judgment had to be reversed when the expert was not permitted to testify due to counsel's failure to disclose the identity of the witness as required by local rules.[2]

There never was a lawful determination that Melissa would not suffer detriment if forced to live with her father.

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2. *State of Cal. ex rel. Public Works Board v. Bragg*, 183 Cal. App. 3d 1018, 228 Cal. Rptr. 576 (1986).

Nevertheless, the Court of Appeal dismissed the appeal based upon the conduct of Melissa's grandparents and their counsel. Instead of protecting Melissa, the court deliberately abandoned her with full knowledge and a complete disregard for her physical safety and mental well being. The Court was provided with a verified petition under oath informing it that Melissa had indicated she would run away or kill herself if forced to live with her father. The Court obviously did not care.

It however was legally obligated under substantive and procedural due process principles to guard the welfare and safety of minor children. Instead it did everything in its power to declare that the marriage had to be invalidated, thus knowingly forcing Melissa into a situation where she could no longer challenge the legally improper judgment which was not the product of a fair trial. This conduct will be condoned unless this Court grants the instant Petition.

## 2. THE PETITION INVOLVES ISSUES OF EXCEPTIONAL IMPORTANCE RELATING TO THE INTENTIONAL DEPRIVATION OF A PERSON'S LIBERTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY THE COURT BASED UPON ANOTHER PERSON'S ACTIONS.

The Fourteenth Amendment entitles the Petitioner Melissa Williams Holzer to substantive and procedural due process. The dismissal of the appeal to punish her grandparents with knowledge that the judgment to be used to compel Melissa to live with her father was not the product of a fair trial and that there was no lawful determination she would not suffer detriment if forced to live with him violates Melissa's substantive and procedural due process rights.

Ca. Code of Civ. Procedure §§ 902, *et seq.* provides for an appeal as of right in civil cases to the Court of Appeal. In *Evitts v. Lucey*, 469 U.S. 387, 400, 83 L. Ed. 2d 821, 105 S. Ct. 830, *reh. denied*, 470 U.S. 1065, 84 L. Ed. 2d 841, 105 S. Ct. 1783 (1985), this Court held that while a state need not provide a system of appellate review as of right at all, it must nonetheless make those decisions in accord with the due process clause. And, when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accordance with the dictates of the Constitution, and in particular, in accord with the due process clause.

Thus, if the state creates an entitlement to appeal, the constitution requires due process of law. *Mathis v. Hood*, 937 F.2d 709 (2d Cir. 1991); *Simmons v. Reynolds*, 898 F.2d 865 (2d Cir. 1990).

In keeping with due process, state appellate courts must apply their rules governing appellate review in a way that provides a fair opportunity to obtain adjudication on the merits of the appeal. *Branch v. Turner*, 37 F.3d 371 (8th Cir. 1994), *cert. granted, rev'd, Goeske v. Branch*, 115 S. Ct. 1275, 514 U.S. 115, 131 L. Ed. 2d 152. Dismissing the appeal based upon the actions of others does not provide Melissa with a fair opportunity to obtain an adjudication on the merits.

Mr. Justice Douglas's dissent (concurred with by Mr. Justice Brennan and Mr. Justice Stewart) in *Monger v. Florida*, 405 U.S. 958, 92 S. Ct. 1163, 31 L. Ed. 2d 236 (1972) noted that while the Federal Constitution contains no requirement that a State provide appellate courts or even that there be a right to appellate review, that is not to say, however, that once appellate review has been provided a State may

deny it arbitrarily or capriciously without violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

While it is for state courts to determine adjective as well as substantive law of state, they must, in so doing, accord parties due process of law. *Richards v. Jefferson County*, 116 S. Ct. 1761, 517 U.S. 793, 135 L. Ed. 2d 76 (1996), *on remand* 682 So. 2d 409, subsequent mandamus proceeding Ex parte Jefferson County, 710 So. 2d 908.

In *Evitts v. Lucey*, 469 U.S. 387, 400, 83 L. Ed. 2d 821, 105 S. Ct. 830, *reh. denied*, 470 U.S. 1065, 84 L. Ed. 2d 841, 105 S. Ct. 1783 (1985), this Court held that if a state chooses to dismiss an appeal when an incompetent attorney violates local rules, it may do so if such action does not intrude upon a client's rights to due process.

The decision of the Appellate Court in this matter is in direct contradiction to *Evitts*. In the instant matter, the appellate court dismissed the appeal based upon Petitioners actions and those of its counsel. Yet, in so doing, it deprived Melissa of her due process rights to a fair determination as to whether she will suffer detriment if forced to live with her father and whether it was in her best interests to do so.

Thus, just as the accused in a criminal case should not have his liberty taken away and lose his right to appeal due to the fault of his attorney, Melissa should not have her right to appeal sacrificed because of the alleged conduct of the other Petitioners.

Minors are afforded due process in civil proceedings. *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

Melissa is entitled to substantive due process as well. This Court has implicitly recognized that the rights of children will take precedence over the rights of adults when the two conflict. Thus, while the relationship between parent and child is constitutionally protected, when the unfitness of a parent is shown, the state will intrude into that relationship to protect the child. *See, e.g., Quilloin v. Walcott, et ux.*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) (State is barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent).

*Assuming arguendo*, that the Court of Appeal was correct in determining that the Weiss's violated the order of the trial court, dismissing the appeal when it was clear that Melissa did not receive a fair trial as a matter of law was a deprivation of Melissa's substantive due process rights given the state's compelling interest to protect her health, safety and welfare. The Appellate Court cannot simply turn its back on a minor with knowledge Melissa did not receive a fair trial as a matter of law. Especially where the court indicates Grandparents could not consent to the marriage with the court's knowledge of pending annulment proceedings.

This Court can see from the decision of the Appellate Court that it believed the marriage was not valid. It knew father was pursuing annulment proceedings. It in fact was told that the Judge presiding over those proceedings indicated it was not likely the marriage would remain in tact. Thus, Melissa herself was punished because she decided to marry. And, implicit in the Court's opinion is that the Marriage somehow vitiated the State's obligation to protect minor children from befalling harm.

Both the probate investigator and the court appointed psychiatrist believed that it was not in Melissa's best interest to live with her father. The psychiatrist opined that if Melissa were not permitted to live where she wanted, she might act out or even run away. Specifically, his written evaluation found that Respondent had showed little, if any interest in his daughters as he made no effort to take advantage of the visitation awarded to him by the trial court.

Respondent in fact missed 21 visits as a result of failing to make arrangements for the visitation. The evaluation noted that Melissa spent most of her time with Appellants (page 23 of report) and that a regular visitation schedule was not adhered to by her father. At page 24-27 of Dr. Katz's report, he reveals his findings which delineate his concerns about Melissa living with her father and concludes at page 27 that if the Court was not to allow Melissa to live where she chooses, there is a very high risk that she would act out, or even run away from home. This is clearly detriment. The Court of Appeal was told Melissa had threatened to run away or kill herself if she were forced to live with her father. Despite this, it fed her to the wolves.

Petitioners are aware of this Court's holding in *Goeke v. Branch*, 514 U.S. 115, 115 S. Ct. 1275, 131 L. Ed. 2d 152 (1995) where the Court noted that states retain the ability to conduct appeals in accordance with reasonable procedural rules and indicated that if the Supreme Court of a State acts in consonance with the constitutional laws of its state and its own procedure, it can only be in very exceptional circumstances that the court would feel justified in saying that there had been a failure of due process.

*Assuming arguendo* that the court had acted in consonance with its own constitutional laws, and this is a big assumption to make, it is respectfully submitted that Petitioners have demonstrated just such a circumstance. The law in California is clear that when the constitutional rights of parents and children conflict, the children's rights will take precedence and the State is obligated to protect the child.

This is not a case like *Goeke* where the respondent, after allegedly murdering her husband, took flight to a neighboring country and therefore lost her right to appeal.

It is important to note that the Petitioners were not in violation of Judge Chavez's order. The Court had issued a blanket 30 day stay orally at trial. Even its written decision gave custody of Melissa to the Petitioners for 30 days. *See* par. #3 of Appendix D. Melissa did try to go live with her father within the thirty day period. The Weisses had in fact encouraged her to do so. At the time Melissa returned to her father, no one had attempted to rely upon the marriage. It was solely up to Melissa as to whether she was going to assert the fact of the marriage.

If the Petitioners all encouraged Melissa to return to her father and try living with him, how could that be a frustration of the trial court's judgment?

Most importantly however, Petitioners could not have acted to subvert the order of the trial court because the trial court had limited jurisdiction only to conduct an evidentiary hearing and report its findings of fact and conclusions of law to the Court of Appeal. *See* Exhibit "H" of Petition for Rehearing.

In April of 2001, the Appellate Court had issued a stay of all proceedings except the evidentiary hearing.

Supreme Court of California precedent clearly supports Petitioners argument that because the stay of proceedings took effect when they had custody, they continued to have custody until the stay was lifted.

In *Foster v. Foster*, 5 Cal. 2d 669, 55 P.2d 1175 (1936) the Supreme Court of California held that a stay of proceedings has the legitimate effect of keeping the subject thereof in the condition in which it was when the stay of proceedings was granted.

Thus, in *Foster*, when proceedings were stayed as of the date of entry of judgment and the petitioner was legally entitled to the custody of the minor at said time under an order granting temporary custody, a stay of proceedings pending appeal had the effect of permitting the petitioner to retain custody of the child until the final determination of the appeal from the judgment. *Id.*

The Appellate Court in the instant matter took a position directly contrary to *Foster* and was able to assert that Petitioners had violated the Court's orders by indicated its stay had the effect of *merely* "holding everything in abeyance", including the temporary letters. Yet this finding flies in the face of *Foster.*

The stay was lifted by the Court of Appeal after Melissa had gotten married by order dated July 6, 2001. *See* Exhibit "I" of Petition for Rehearing.

**3. THE FEDERAL QUESTION HEREIN PRESENTED HAS NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT AS TO WHETHER THE DUE PROCESS CLAUSE WOULD PERMIT THE PETITIONERS TO BE PRECLUDED ON RES JUDICATA AND COLLATERAL ESTOPPEL GROUNDS FROM CHALLENGING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINED IN A JUDGMENT WHICH WAS NOT THE PRODUCT OF A FAIR TRIAL WHERE THOSE FINDINGS AND CONCLUSIONS ARE DIRECTLY RELEVANT IN OTHER LITIGATION INVOLVING THE SAME PARTIES.**

The core of due process rights is the right to notice and meaningful opportunity to be heard. *Richards v. Jefferson County*, 116 S. Ct. 1761, 517 U.S. 793, 135 L. Ed. 2d 76, *on remand*, 682 So. 2d 409 (1996), subsequent mandamus proceeding Ex parte Jefferson County, 710 So. 2d 908.

A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful. *City of West Covina v. Perkins*, 119 S. Ct. 678, 525 U.S. 234, 142 L. Ed. 2d 636, *on remand*, 167 F.3d 1286 (1999).

An essential principal of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Cleveland Bd of Educ. v. Loudermill*, 105 S. Ct. 1487, 470 U.S. 532. 84 L. Ed. 2d 494, *on remand* 651 F. Supp. 92, *affirmed*, 844 F.2d 304, *cert. denied*, 109 S. Ct. 363, 488 U.S. 941, 102 L. Ed. 2d 353, *cert. denied*, 109 S. Ct. 377, 488 U.S. 946,102 L. Ed. 2d 365 (1995).

Besides cutting off Melissa's rights to challenge the unlawful judgment, by dismissing the appeal, the court precluded Petitioners Fran and Arthur Weiss from challenging the judgment which was not the product of a fair trial.

It is undisputed that Respondent has commenced a "child stealing" lawsuit against Petitioners. *See* Exhibit "M" of Petition for Rehearing. The complaint has since been amended to assert a cause of action for malicious prosecution based upon Petitioners alleged "lies" to the court which permitted them to remain as the guardians of Melissa for years. *See* Exhibit "B" of Request for Judicial Notice in connection with Petition for Review. The unlawful findings of fact and conclusions of law made by the trial court now have a res judicata effect and Petitioners Fran and Arthur Weiss are precluded from challenging those findings.

Those findings include:

A. It is in the best interests of Melissa Williams to be returned to the custody of Respondent-Father;

B. Respondent-Father has not subjected his minor daughters to physical, psychological or mental abuse;

C. Respondent-Father appears to be a fit and proper parent for his minor children; and

D. Respondent-Father has the ability to provide for the needs of his minor daughters.

Petitioners defense to the child stealing lawsuit was that they were acting in Melissa's best interests. Even though these findings were not the product of a fair trial, because the Appellate Court dismissed the appeal, Petitioners Fran and Arthur Weiss will now be precluded from challenging them. This is a deprivation of their Due Process rights.

In addition, because the Petitioners were not given the opportunity by the Appellate Court to explain that they had not acted to frustrate any orders of the trial court and were not in contempt of any orders when the Appellate Court refused to consider the facts contained in the Petition for Rehearing and those facts served as a basis for dismissal of the appeal, Petitioners were also deprived of their due process rights.

Thus, even if the Court could somehow justify dismissal of the appeal because of Petitioners' conduct, it would be a deprivation of the Petitioners' due process rights if the findings of fact and conclusions of law that were the product of an unfair trial could be used against the Petitioners in other ongoing proceedings involving the same parties. The fact that the same issues are involved in the separate matters lends credence to Petitioners assertion that the issues raised in the appeal were not rendered moot as a result of the marriage.

## 4. A FEDERAL QUESTION OF SUBSTANTIAL IMPORTANCE IS PRESENTED BY THIS PETITION AS TO WHETHER THE DUE PROCESS CLAUSE PERMITS ATTORNEYS TO BE SANCTIONED AND ADJUDGED TO BE IN CONTEMPT OF COURT WITHOUT GRANTING THE ATTORNEYS NOTICE AND AN OPPORTUNITY TO BE HEARD REGARDING THEIR ALLEGED ACTIONS.

As a matter of due process, the party to be sanctioned requires notice that sanctions may be imposed, an opportunity to respond and a hearing. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 767, 100 S. Ct. 2455, 2464 (1980).

When the Appellate Court would not grant the Petition for Rehearing for purposes of considering the facts raised by Petitioners after the Court failed to provide notice that the Court intended to find Petitioners in contempt of another court, and thereafter sanctioned counsel, it deprived counsel of their property in degradation to their due process rights.

If the Court were going to accuse counsel of being in contempt of court, counsel should have been given ample opportunity to address these charges. Instead, they were raised by the Court of Appeal for the first time in its written decision without giving counsel the opportunity to respond to the charges and brief the matter. Its refusal to consider the facts asserted by counsel in granting the Petition for Rehearing and thereafter sanctioning them based upon those facts was a serious violation of due process.

The sanctioning of counsel is a significant action to be taken by any court. Procedural due process is essential or else the imposition of sanctions is not constitutional. The Court of Appeal's decision amounts to an unconstitutional taking because of its failure to permit the Petitioning attorneys to be heard on the issue of their conduct. This is a very important public issue which should be reviewed by the Court. It is not just a matter of the sanctions. The Court specifically refused to consider and permit counsel to provide their defense to charges of wrongdoing leveled against counsel for the first time in the Court's opinion.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD A. MARCUS
4221 Wilshire Blvd.
Suite 397
Los Angeles, CA 90010
(323) 954-8054

MICHAEL SPIEGEL
*Counsel of Record*
4221 Wilshire Blvd.
Suite 395
Los Angeles, CA 90010
(323) 964-9050

MELODYE S. HANNES
4419 Coldwater Canyon Ave.
Suite I
Studio City, CA 91601
(818) 781-0166

*Attorneys for Petitioners*

# APPENDIX

**APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE DATED AND FILED MARCH 19, 2002**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE**

B151211

(Super. Ct. No. BP057452)

Guardianship of
MELISSA W., a Minor.

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FRAN W. and ARTHUR W.,

Petitioners and Appellants,

v.

TERRY W.,

Objector and Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Appeal dismissed.

INTRODUCTION

Grandparents petitioned for guardianship of their minor granddaughter, Melissa. Following trial, the court found Melissa's father to be a fit parent, denied grandparents'

petition, and ordered the child returned to father "forthwith." At grandparents' request, the trial court briefly stayed the relocation to enable the child to finish the school year. Grandparents filed their appeal but before returning the child to her father, grandparents' counsel accompanied 16-year-old Melissa to the Bahamas where the child was purportedly married with grandparent's consent.[1] Once father learned of the marriage, he moved this court for dismissal of the appeal.

The circumstances of this case require imposition of the ultimate sanction of dismissal of the appeal. Grandparents may not obtain review of the judgment while at the same time being in violation of the very judgment from which they appeal. Additionally, the conduct of grandparents and counsel in arranging Melissa's emancipation by way of the purported marriage has rendered moot the issue of guardianship. For these reasons, we grant father's motion and dismiss this appeal. We also impose monetary sanctions against grandparents' counsel for continuing to prosecute the appeal after it became moot by reason of Melissa's marriage.

## SUMMARY OF FACTS AND PROCEEDINGS

On March 28, 1997, Cheryle, Melissa's mother, died. She was survived by her husband, Terry (father) and their two daughters, then 11-year-old Melissa and 10-year-old Courtney. The family was residing in Los Angeles. Appellants

1. The issue before us is whether the appeal is subject to dismissal due to the conduct of grandparents and their counsel. We do not pass on the validity of the purported marriage, which question is currently pending before the El Dorado Superior Court in father's annulment proceeding.

are the decedent's parents and Melissa's grandparents, Fran and Arthur W. (grandparents). Father later relocated to Placerville but allowed his daughters to live with grandparents in Los Angeles to finish the school year. On July 23, 1999, grandparents filed a petition for guardianship of the minors. Eventually, Courtney returned to her father's custody.

On June 12, 2001, after three days of trial of the petition for guardianship of Melissa, the trial court issued a judgment denying the petition. The trial court specifically found, inter alia, that father is a fit and proper parent to his children; he has the ability to provide for their needs; it is in Melissa's best interest to be returned to her father's custody; and there is no basis for the trial court to interfere with the constitutionally protected fundamental right of father to parent his children. The trial court then ordered that Melissa "shall be returned to the custody of Respondent-Father, *forthwith.*" (Italics added.) At their request for time to allow Melissa to finish the school year and the grandparents to appeal, the trial court granted grandparents a brief stay of the judgment to July 7, 2001.

On June 27, 2001, grandparents filed their notice of appeal from the judgment denying the guardianship petition.

That same day, grandparents executed purported consent forms, granting their permission for Melissa, then aged 16, to marry 19-year-old Austin H. On the consent forms, grandparents indicated they were consenting *as Melissa's legal guardians,* despite the fact the June 12, 2001, judgment

unambiguously denied grandparents' guardianship petition.[2] This purported consent was written on the letterhead of grandparents' counsel, Melodye S. Hannes.

On June 28, 2001, Melissa arrived in the Bahamas accompanied by attorney Hannes.

Meanwhile, grandparents concurrently moved the trial court for a stay of the judgment pending appeal on the ground Melissa would suffer detriment if she were to reside with father during that time. In seeking that stay, grandparents failed to disclose to the trial court Melissa's imminent nuptials.

On June 29, 2001, grandparents filed a petition for writ of supersedeas in this court seeking a stay of the order directing Melissa's return to father, reiterating the grounds raised in the lower court, and likewise omitting any mention of the planned wedding.

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2. Any claimed reliance by grandparents on a pretrial order granting temporary guardianship was unsupported. By way of background, on March 14, 2001, the trial court ordered temporary guardianship of Melissa to grandparents, pendente lite, to continue until May 21, 2001. Apparently, no letters of guardianship were issued. Father sought a writ of mandate in this court challenging the temporary guardianship. On April 12, 2001, in response to father's petition, this court issued a stay of all proceedings except for trial of the guardianship petition. This stay had the effect of placing guardianship in abeyance pending trial. Thus, after May 21, 2001, grandparents were no longer Melissa's temporary guardians. Moreover, irrespective of any claimed status as *temporary guardians* of Melissa prior to trial, grandparents clearly lacked authority after the adverse judgment to consent to Melissa's marriage, and counsel should have been aware of that fact.

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On July 2, 2001, Melissa was purportedly married to Austin H. in the Bahamas. Attorney Hannes executed a Bahamian "Certificate by Parents or Guardian of Consent to Marriage by a Minor," indicating the grandparents' consent to the marriage. In helping to secure the marriage in the Bahamas, counsel apparently did not disclose to the Bahamian Registrar General the June 12, 2001 judgment denying the guardianship petition.[3] The marriage was solemnized in the presence of Hannes as one of the witnesses.

On July 7, 2001, Melissa returned to her father in Placerville, where she remained until month's end.

On July 19, 2001, grandparents filed a request in this court for an immediate stay of the judgment pending appeal. On July 25, 2001, this court summarily denied the petition for writ of supersedeas and request for stay.

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3. We note that Hannes asserts she in fact supplied a copy of the judgment to the Bahamian Registrar General. However, in an exhibit attached to father's motion to dismiss the appeal, which exhibit was received without objection, the Director of Legal Affairs of the Office of the Attorney General of the Commonwealth of the Bahamas (the Director) opined the Bahamian Registrar General properly accepted grandparents' consent "as he was not in possession of the judgment."

The Director explained application would have to be made to the Bahamian Supreme Court to have the marriage declared void on the ground consent was not validly given. Similarly, California law requires written consent of parents or guardians in order for a minor to marry. (Fam. Code, § 302.)

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On July 30, 2001, father first learned of his daughter's Bahamian marriage when he found a note in his mailbox signed "Melissa H.," Austin's surname. Father moved for a dismissal of grandparents' appeal, arguing the purported marriage had the effect of emancipating Melissa so as to render the appeal moot; grandparents' defiance of the judgment denying the guardianship petition precluded them from seeking review of that judgment; and grandparents' failure to voluntarily dismiss the appeal upon the marriage warranted the imposition of sanctions.

We issued an order to show cause why the appeal should not be dismissed, specially set the matter, and heard oral argument.

## DISCUSSION

1. *Effect of grandparents' defiance of judgment on their right to appeal.*

Grandparents were promptly bound by the June 12, 2001, judgment denying their petition for guardianship, absent an applicable stay. (Code Civ. Proc., § 917.7[4].)[5] As indicated,

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4. Code of Civil Procedure section 917.7 states, "The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action. . . . However, the trial court may in its discretion stay execution of these provisions pending review on appeal or for any other period or periods that it may deem appropriate. . . ."

5. Grandparents contend because the trial court stayed the judgment, they had a good-faith legal argument that they were Melissa's legal guardians at the time they executed the consent forms. (Cont'd)

the judgment included a provision for a brief stay to July 7, 2001, but only of "the order to return Melissa" to her father. The purpose of staying relocation for a month was to enable Melissa to finish the school year. The court did not stay its order denying the guardianship petition and did not stay its order confirming custody in the father "*forthwith.*" (Italics added.) The trial court's unambiguous denial of the guardianship petition was immediately effective and binding upon the parties. (Code Civ. Proc., § 917.7.) Because father retained legal custody, grandparents had no authority to consent as guardians to Melissa's marriage. Likewise, their counsel undermined the June 12, 2001, judgment by accompanying Melissa to the Bahamas and participating in procuring a marriage designed to alter the child's legal status.[6] In doing so, grandparents and counsel thwarted the very judgment of which they now seek review. "It is illogical and inequitable for appellant[s] to seek appellate review of the very orders [they have] blatantly violated." (*In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1227.)

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(Cont'd)

However, as explained in footnote 2, *ante*, at the time of trial the grandparents were no longer Melissa's temporary guardians. Therefore, the stay of the judgment to July 7, 2001, did not have the effect of reviving or extending guardianship status to the grandparents during the period of the stay.

6. Counsel contend they did nothing more than fulfill their obligation to advise their clients, grandparents and Melissa, of their legal options. However, there is a great difference between an attorney's advising a client of his or her legal options and the consequences thereof, as contrasted with affirmative conduct to frustrate a valid judgment not to one's liking by accompanying a child to a foreign jurisdiction for the purpose of entering into a questionable marriage.

*Appendix A*

"It is well settled that this court has the inherent power to dismiss an appeal by any party who has refused to comply with the orders of the trial court. [Citations.]" (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379.) "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]" (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.)

A formal judgment of contempt is not a prerequisite to exercising our power to dismiss. (*Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1683.) The power to dismiss " 'applies to wilful disobedience or obstructive tactics without such an adjudication.' [Citations.]" *(Ibid.)*

The power to dismiss an appeal for violation of a court order has been exercised in the child dependency context. In *Kamelia S.,* the child was ordered placed in foster care. The father appealed from that order, and while the appeal was pending, he took the law into his own hands and absconded with the minor. (*In re Kamelia S., supra,* 82 Cal.App.4th at pp. 1225-1226.) The father's appeal was dismissed on the ground that appellant was not entitled to obtain review of the juvenile court's order while at the same time being in contempt of the very order from which he appealed. *(Ibid.)*

These authorities compel the conclusion that by undermining the trial court's judgment, grandparents and counsel have forfeited their right to prosecute this appeal. Grandparents lacked authority to consent to Melissa's marriage. Nonetheless, they and counsel helped arrange the

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Bahamian marriage to emancipate Melissa for the purpose of negating the effect of the judgment confirming custody in father. Their obstructive tactics call for the exercise of this court's inherent power to impose the ultimate sanction of dismissal.

2. *Effect of Melissa's purported marriage on continued existence of controversy to be resolved on appeal.*

As an additional and independent ground for dismissing this appeal, it appears the matter has been rendered moot by Melissa's purported marriage. The appeal was taken from the judgment denying grandparents' petition for guardianship of Melissa. Grandparents continue to insist the marriage is valid. If, as grandparents contend, Melissa is validly married, she is currently emancipated by operation of law (Fam. Code, § 7002, subd. (a)), and no longer requires the protection of the guardianship grandparents seek. (*In re Katherine R.* (1970) 6 Cal.App.3d 354, 357.) The conduct of grandparents and their counsel in helping to arrange the marriage has mooted the issue of guardianship. In view of Melissa's present status as an emancipated minor, review and reversal of the judgment denying guardianship would be an idle act because this court cannot afford grandparents any effective relief from that judgment. Therefore, the appeal is also dismissed on the ground of mootness.

3. *Sanctions for frivolous appeal.*

Father requests monetary sanctions for grandparents' prosecution of a frivolous appeal.

*Appendix A*

"[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) An appeal that may have been meritorious when commenced can become frivolous by the occurrence of subsequent events which render the appeal moot. (*Hale v. Laden* (1986) 178 Cal.App.3d 668, 674-675; *Wax v. Infante* (1983) 145 Cal.App.3d 1029, 1031.) It is the duty of appellants and their counsel promptly to dismiss an appeal once it becomes moot "and not put respondent, his counsel, and this court to the time and expense of reviewing an appeal that had become moot. . . ." (*Wax v. Infante*, *supra*, at p. 1031.)

In compliance with *Flaherty's* procedural requirements, we advised the parties we were considering the imposition of sanctions and pursuant to said advisement, we heard oral argument on the subject. Father's counsel filed a declaration seeking fees and grandparents' counsel responded thereto. This opinion constitutes the written statement of reasons required by *Flaherty*. (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 654.)

Even assuming the appeal may have been meritorious when commenced, until the marriage isjudicially annulled, Melissa's marriage emancipates her by operation of law. This state of affairs renders moot the appeal from the judgment denying the guardianship petition. Nonetheless, grandparents and their counsel persisted in prosecuting the appeal, thereby putting father and this court to needless time and expense.

Father's counsel, Freda D. Pechner submitted a declaration and supporting exhibit seeking $22,803.75 in legal fees incurred in connection with this appeal. We have examined counsel's declaration and the opposition thereto and heard oral argument on this issue. Based thereon, we conclude the reasonable amount of the expenses incurred by father in defending this appeal following the July 2, 2001 marriage is $13,004.[7]

## DISPOSITION

The order to show cause is discharged. Father's motion to dismiss the appeal is granted and the appeal is dismissed. Father shall recover costs on appeal. In addition Melodye S. Hannes and Richard A. Marcus are directed to pay father $13,004 as sanctions for prosecuting a frivolous appeal.

The matter is referred to the State Bar for investigation. In that the dismissal is "based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney" (Bus. & Prof. Code, § 6086.7, subd. (b)), and because sanctions exceed $1,000.00 (Bus. & Prof. Code, § 6086.7, subd. (c)), the clerk of this court is directed forthwith to send a copy of this opinion to the State Bar.

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7. The court is aware that a number of proceedings are pending in El Dorado County, including an action to annul the purported Bahamian marriage and a damages action against grandparents and their counsel. However, to reiterate, the only issue to be decided by this court in this opinion is whether the instant appeal is subject to dismissal, and the father's concomitant request for monetary sanctions.

*Appendix A*

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P.J. P.J.KITCHING, J.

**APPENDIX B — ORDER MODIFYING OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, DATED AND FILED APRIL 11, 2002**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE**

B151211

(Super. Ct. No. BP057452)

Guardianship of
MELISSA W., a Minor.

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FRAN W. and ARTHUR W.,

Petitioners and Appellants,

v.

TERRY W.,

Objector and Respondent.

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

*Appendix B*

THE COURT:

It is ordered that the opinion filed herein on March 19, 2002, be modified as follows:

Replace Section 3 of the Discussion, at page 9, line 15, through page 11, line 2, and including footnote 7, with the following revised Section 3:

3. *Sanctions for frivolous appeal.*

Father requests monetary sanctions for grandparents' prosecution of a frivolous appeal.

"[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — *or* when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, italics added.)

Having reviewed the record, we conclude that under either an objective standard (see, e.g., *Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1008-1009 [sanctions imposed because appeal indisputably lacked merit]), a subjective standard (see, e.g., *In re Marriage of Stich* (1985) 169 Cal.App.3d 64, 77 [sanctions imposed because appeal was pursued solely for purpose of delay]), or a combination of the two standards (see, e.g., *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 32, fn. 9 [frivolous nature of appeal provided evidence it was prosecuted solely for purpose of delay]), this appeal is frivolous.

*Appendix B*

In compliance with *Flaherty's* procedure requirements, we advised the parties we were considering the imposition of sanctions and pursuant to said advisement, we heard oral argument on the subject. Father's counsel filed a declaration seeking fees and grandparents' counsel responded thereto. This opinion constitutes the written statement of reasons required by *Flaherty*. (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 654.)

An appeal that may have been meritorious when commenced can become frivolous by the occurrence of subsequent events which render the appeal moot. (*Hale v. Laden* (1986) 178 Cal.App.3d 668, 674-675; *Wax v. Infante* (1983) 145 Cal.App.3d 1029, 1031.) It is the duty of appellants and their counsel promptly to dismiss an appeal once it becomes moot "and not put respondent, his counsel, and this court to the time and expense of reviewing an appeal that had become moot . . . ." (*Wax v. Infante*, *supra*, at p. 1031.)

Even assuming the appeal may have been meritorious when commenced, until the marriage is judicially annulled, Melissa's marriage emancipates her by operation of law. This state of affairs renders moot the appeal from the judgment denying the guardianship petition. Nonetheless, grandparents and their counsel persisted in prosecuting the appeal, thereby putting father and this court to needless time and expense.

Father's counsel, Freda D. Pechner, submitted a declaration and supporting exhibit seeking $22,803.75 in legal fees incurred in connection with this appeal. We have examined counsel's declaration and the opposition thereto

and heard oral argument on this issue. Based thereon, we conclude the reasonable amount of the expenses incurred by father in defending this appeal following the July 2, 2001 marriage is $13,004.[7]

[There is no change in the judgment.]

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7. The court is aware that a number of proceedings are pending in El Dorado County, including an action to annul the purported Bahamian marriage and a damages action against grandparents and their counsel. However, to reiterate, the only issue to be decided by this court in this opinion is whether the instant appeal is subject to dismissal, and the father's concomitant request for monetary sanctions.

## APPENDIX C — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, DATED AND FILED FEBRUARY 7, 2002

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE**

B151211
(Super. Ct. No. BP057452)

Guardianship of
MELISSA W., a Minor

FRAN W. and ARTHUR W.,

Petitioners and Appellants,

v.

TERRY W.,

Objector and Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor E. Chavez, Judge. Appeal dismissed.

### INTRODUCTION

Grandparents petitioned for guardianship of their minor granddaughter, Melissa. Following trial, the court found Melissa's father to be a fit parent, denied grandparents'

petition, and ordered the child returned to father "forthwith." At grandparents' request, the trial court briefly stayed the relocation to enable the child to finish the school year. Grandparents filed their appeal but before returning the child to her father, grandparents' counsel escorted 16-year-old Melissa to the Bahamas where the child was purportedly married.[1] The fact of the marriage was not disclosed to father or to this court. Once father learned of the marriage, he moved this court for dismissal of the appeal.

The egregious circumstances of this case require imposition of the ultimate sanction of dismissal of the appeal. Grandparents may not obtain review of the judgment while at the same time being in violation of the very judgment from which they appeal. Additionally, the conduct of grandparents and counsel in engineering Melissa's emancipation by way of the purported marriage has rendered moot the issue of guardianship. For these reasons, we grant father's motion and dismiss this appeal.

## SUMMARY OF FACTS AND PROCEEDINGS

Briefly summarized, the undisputed facts establish that on March 28, 1997, Cheryle, Melissa's mother, died. She was survived by her husband, Terry (father) and their two daughters, then 11-year-old Melissa and 10-year-old Courtney. The family was residing in Los Angeles. Appellants

1. The sole issue before us is whether the appeal is subject to dismissal due to the conduct of grandparents and their counsel. We do not pass on the validity of the purported marriage, which question is currently pending before the El Dorado Superior Court in father's annulment proceeding.

are the decedent's parents and Melissa's grandparents, Fran and Arthur W. (grandparents). Father later relocated to Placerville but allowed his daughters to live with grandparents in Los Angeles to finish the school year. On July 23, 1999, grandparents filed a petition for guardianship of the minors. Eventually, Courtney returned to her father's custody.

On June 12, 2001, after three days of trial of the petition for guardianship of Melissa, the trial court issued a judgment denying the petition. The trial court specifically found, inter alia, that father is a fit and proper parent to his children; he has the ability to provide for their needs; it is in Melissa's best interest to be returned to her father's custody; and there is no basis for the trial court to interfere with the constitutionally protected fundamental right of father to parent his children. The trial court then ordered that Melissa "shall be returned to the custody of Respondent-Father, *forthwith.*" (Italics added.) At their request for time to allow Melissa to finish the school year and the grandparents to appeal, the trial court granted grandparents a brief stay of the relocation order to July 7, 2001.

On June 27, 2001, grandparents filed their notice of appeal from the judgment denying the guardianship petition.

That same day, grandparents executed purported consent forms, granting their permission for Melissa, then aged 16, to marry 19-year-old Austin H. On the consent forms, grandparents indicated they were consenting *as Melissa's legal guardians,* despite the fact the June 12, 2001, judgment

unambiguously denied grandparents' guardianship petition.[2] This purported consent was written on the letterhead of grandparents' counsel, Melodye S. Hannes.

On June 28, 2001, Melissa arrived in the Bahamas accompanied by attorney Hannes.

Meanwhile, grandparents concurrently moved the trial court for a stay of the judgment pending appeal on the ground Melissa would suffer detriment if she were to reside with father during that time. In seeking that stay, grandparents failed to disclose to the trial court Melissa's imminent nuptials.

On June 29, 2001, grandparents filed a petition for writ of supersedeas in this court seeking a stay of the order directing Melissa's return to father, reiterating the grounds raised in the lower court, and likewise neglecting to inform this court of the planned wedding.

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2. Any claimed reliance by grandparents on a pretrial order granting temporary guardianship was unsupported. By way of background, on March 14, 2001, the trial court ordered temporary guardianship of Melissa to grandparents, pendente lite, to continue until May 21, 2001. Apparently, no letters of guardianship were issued. Father sought a writ of mandate in this court challenging the temporary guardianship. On April 12, 2001, in response to father's petition, this court issued a stay of all proceedings except for trial of the guardianship petition. This stay had the effect of placing guardianship in abeyance pending trial. In any event, irrespective of any claimed status as temporary guardians of Melissa prior to trial, grandparents clearly lacked authority after the adverse judgment to consent to Melissa's marriage, and counsel should have been aware of that fact.

*Appendix C*

On July 2, 2001, Melissa was purportedly married in the Bahamas to Austin H. Attorney Hannes executed a Bahamian "Certificate by Parents or Guardian of Consent to Marriage by a Minor," indicating the grandparents' consent to the marriage. In procuring the marriage in the Bahamas, counsel did not disclose to the Bahamian Registrar General the June 12, 2001 judgment denying the guardianship petition.[3] The marriage was solemnized in the presence of Hannes as one of the witnesses.

On July 7, 2001, Melissa returned to her father in Placerville.

On July 19, 2001, grandparents filed a request in this court for an immediate stay of the judgment pending appeal. The attached declaration of Hannes's associate, attorney Richard A. Marcus, reported "two new events"[4] of which this court should be aware. *Neither of those events was Melissa's purported marriage; no mention was made in the*

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3. The Director of Legal Affairs of the Office of the Attorney General of the Commonwealth of the Bahamas opined the Bahamian Registrar General properly accepted grandparents' consent "as he was not in possession of the judgment." The Director explained application would have to be made to the Bahamian Supreme Court to have the marriage declared void on the ground consent was not validly given.

Similarly, California law requires written consent of parents or guardians in order for a minor to marry. (Fam.Code, § 302.)

4. The new events were (1) Melissa claimed to be miserable at her father's house; and (2) an upcoming hearing was to be held in the trial court.

*request of Melissa's marriage.* On July 25, 2001, this court summarily denied the petition for writ of supersedeas and request for stay.

On July 30, 2001, father first learned of his daughter's Bahamian marriage when he found a note in his mailbox, signed "Melissa H." Father moved for a dismissal of grandparents' appeal. We issued an order to show cause why the appeal should not be dismissed, specially set the matter, and heard oral argument on February 4, 2002.

## DISCUSSION

1. *Effect of grandparents' defiance of judgment on their right to appeal.*

Grandparents were promptly bound by the June 12, 2001, judgment denying their petition for guardianship, absent an applicable stay. (Code Civ. Proc., § 917.7[5].)[6] As indicated, the judgment included a provision for a brief stay to July 7,

5. Code of Civil Procedure section 917.7 states, "The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action. . . . However, the trial court may in its discretion stay execution of these provisions pending review on appeal or for any other period or periods that it may deem appropriate. . . ."

6. As discussed in footnote 2 *ante*, although the trial court had granted *temporary* guardianship to grandparents before trial, that interlocutory order was superseded by the June 12, 2001 judgment which determined father was a fit parent and denied grandparents' petition for guardianship.

2001, but only of "the order to return Melissa" to her father. The purpose of staying relocation for a month was to enable Melissa to finish the school year. *The court did not stay its order denying the guardianship petition and did not stay its order confirming custody in the father "forthwith."* The trial court's unambiguous denial of the guardianship petition was immediately effective and binding upon the parties. (*Ibid.*) Because father retained legal custody, grandparents had no authority, under color of law or otherwise, to give their purported consent as guardians to Melissa's marriage. Likewise, counsel undermined the June 12, 2001, judgment by spiriting Melissa to the Bahamas, and participating in procuring a marriage designed to alter the child's legal status.[7] In doing so, grandparents and counsel sabotaged the very judgment of which they now seek review. "It is illogical and inequitable for appellant[s] to seek appellate review of the very orders [they have] blatantly violated." (*In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1227.)

"It is well settled that this court has the inherent power to dismiss an appeal by any party who has refused to comply with the orders of the trial court. [Citations.]" (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379) "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of

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7. It is self-evident there is a world of difference between an attorney's advising a client of his or her legal options and the consequences thereof, as contrasted with affirmative conduct to frustrate a valid judgment not to one's liking by escorting a child to a foreign jurisdiction for the purpose of entering into a questionable marriage.

this state. [Citations.]" (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.)

A formal judgment of contempt is not a prerequisite to exercising our power to dismiss. *(Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1683.) The power to dismiss " 'applies to wilful disobedience or obstructive tactics without such an adjudication.' [Citations.]" (*Ibid.*)

The power to dismiss an appeal for violation of a court order has been exercised in the child dependency context. In *Kamelia S.,* the child was ordered placed in foster care. The father appealed from that order, and while the appeal was pending, he took the law into his own hands and absconded with the minor. (*In re Kamelia S.*, *supra*, 82 Cal.App.4th at pp. 1225-1226.) The father's appeal was dismissed on the ground that appellant was not entitled to obtain review of the juvenile court's order while at the same time being in contempt of the very order from which he appealed. (*Ibid.*)

These authorities compel the conclusion that by subverting the trial court's judgment, grandparents and counsel have forfeited their right to prosecute this appeal. Grandparents lacked authority to consent to Melissa's marriage. Nonetheless, they and counsel orchestrated the Bahamian marriage to emancipate Melissa for the purpose of negating the effect of the judgment confirming custody in father. Grandparents and counsel actively participated in sabotaging the judgment. Their obstructive tactics call for the exercise of this court's inherent power to impose the ultimate sanction of dismissal.

*Appendix C*

This court is troubled not only by the counsel's participation in the marriage, but also in the subsequent failure to advise this court of that event. Grandparents' counsel assert they were ethically precluded from revealing the fact of the purported marriage by principles of attorney-client privilege. However, marriage is a matter of public record (compare Fam. Code, § 511 [confidential marriage certificate not open to public inspection]), and the fact of the purported marriage entirely changed the posture of this case. It is astounding that in their many communications with this court, including updates of events in the case, counsel omitted any mention of something as pivotal and as public as the purported marriage and resulting emancipation (Fam. Code, § 7002, subd. (a)) of the very subject of this proceeding, with its mooting consequences as discussed in the next section.

This course of conduct in arranging the purported marriage to thwart the judgment, compounded by the subsequent concealment of that event from both this court and the trial court, compels the dismissal sanction.

2. *Effect of Melissa's purported marriage on continued existence of controversy to be resolved on appeal.*

As an additional and independent ground for dismissing this appeal, it appears the matter has been rendered moot by Melissa's purported marriage. The appeal was taken from the judgment denying grandparents' petition for guardianship of Melissa. Grandparents continue to insist the marriage is valid. If, as grandparents contend, Melissa is validly married, she is emancipated (Fam. Code, § 7002, subd. (a)), and no

longer requires the protection of the guardianship grandparents seek. (*In re Katherine R.* (1970) 6 Cal.App.3d 354, 357.) The conduct of grandparents and counsel in engineering the marriage has mooted the issue of guardianship. Consequently, review of the judgment denying guardianship would be an idle act.

3. *Sanctions for frivolous appeal.*

Father requests monetary sanctions, arguing grandparents are prosecuting this appeal for purposes of delay. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637.) Although father has obviously incurred substantial attorney fees in the multiplicity of litigation that the guardianship petition has spawned,[8] the request for sanctions was not supported by a declaration setting forth the amount of attorney fees father incurred in responding to this appeal. Ordinarily, this court would request further briefing to perfect the sanctions issue. However, under the circumstances of this case, to avoid any further delay, the court summarily denies the request for sanctions on procedural grounds only.

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8. The court is aware that a number of proceedings are pending in El Dorado County, including an action to annul the purported Bahamian marriage and a damages action against grandparents and their counsel. However, to reiterate, the only issue to be decided by this court in this order is whether the instant appeal is subject to dismissal.

*Appendix C*

DISPOSITION

The order to show cause is discharged. Father's motion to dismiss the appeal is granted and the appeal is dismissed. Father's request for sanctions is denied. Father shall recover from grandparents and their counsel his costs in this appeal.

The matter is referred to the State Bar for investigation. In that the dismissal is "based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney" (Bus. & Prof. Code, § 6086.7, subd. (b)), the clerk of this court is directed forthwith to send a copy of this dismissal order to the State Bar.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.

## APPENDIX D — JUDGMENT AFTER COURT TRIAL OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES DATED AND FILED JUNE 12, 2001

**SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES**

CASE NO. BP 057452

DATE: June 4, 2001

TIME: 9:00 a.m.

DEPT: 96

In Re The Guardianship of
MELISSA WILLIAMS

Minor

JUDGMENT AFTER COURT TRIAL

This matter came regularly on the above-entitled court's calendar for evidentiary hearing, as ordered by the Court of Appeal, combined with trial on the Petition for Guardianship, before the Honorable Victor E. Chavez, Judge, on June 4 through 7, 2001. Petitioners, FRAN WEISS and ARTHUR WEISS, were present in court, and represented by MELODYE S. HANNES and RICHARD A. MARCUS. Respondent-Father, TERRY WILLIAMS, was present in court, and represented by FREDA D. PECHNER. At the conclusion of the proceedings, the court made the following determinations:

*Appendix D*

1. At no time did Respondent-Father abandon the children, or consent to the instant guardianship.

2. In August, 2000, the minor Courtney Williams returned to the custody of Respondent-Father in the County of El Dorado.

3. Respondent-Father has not subjected his minor daughters to physical, psychological or emotional abuse.

4. Respondent-Father appears to be a fit and proper parent for his minor children.

5. Respondent-Father appears to have the ability to provide for the needs of his minor daughters.

6. It is in the best interests of Melissa Williams to be returned to the custody of Respondent-Father.

7. Petitioners failed to prove, either by a preponderance of the evidence, or by clear and convincing evidence, that the guardianship petition should be granted by the court.

8. There is no basis for the court to interfere with the constitutionally protected fundamental right of Respondent-Father to parent his minor children.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The petition for guardianship of Melissa Williams is denied.

*Appendix D*

2. The minor, Melissa Williams, shall be returned to the custody of Respondent-Father, forthwith.

3. Petitioners are granted a thirty (30) day stay of the order to return Melissa Williams; she shall be returned to the custody of Respondent-Father by July 7, 2001, at the expense of Petitioners.

4. Respondent-Father is entitled to costs, which may include attorney's fees, as proven by cost bill, and upon appropriate motion.

Dated: June 12, 2001

s/ VICTOR E. CHAVEZ
VICTOR E. CHAVEZ

## APPENDIX E — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW DATED AND FILED MAY 22, 2002

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

Guardianship of MELISSA W., a minor.

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FRAN W. AND ARTHUR W.,

Petitioner and Appellants,

v.

TERRY W.,

Objectioner and Respondent.

Petition for review DENIED.

The requests for judicial notice are denied.

George, C.J., and Baxter, J., were absent and did not participate.

s/ CHIN
Acting Chief Justice